

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CLYDE TERRY and ANNE TERRY,
Plaintiffs,

NO. CIV. S 04-2314 MCE GGH

v.

MEMORANDUM AND ORDER

THE TRAVELERS INDEMNITY CO.,
KENNEL PAK, GENTZLER & SMITH
ASSOCIATES, INC.,

Defendants.

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In this case, Plaintiffs Clyde and Anne Terry (collectively "Plaintiffs") claim that Defendants Travelers Indemnity Co., Kennel Pak, and Gentzler & Smith Associates, Inc., acted negligently and fraudulently regarding an insurance policy issued to the Plaintiffs' tenants. Kennel Pak and Gentzler & Smith (collectively "Defendants") ask this Court to strike portions of the Plaintiffs' amended complaint, pursuant to Federal Rule of

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Civil Procedure 12(f).¹ For the reasons set forth below,
Defendants' motion to strike is GRANTED, and the Plaintiffs shall
not have leave to amend.²

BACKGROUND

The Court has already set forth a detailed factual
background for this action in its Memorandum and Order of April
27, 2005 ("the Order"), which is incorporated by reference and
need not be reproduced herein. (Ct. Memo. & Order at 2-5.)
Pursuant to the Court's Order, Plaintiffs filed an amended
complaint reasserting their four original claims against
Defendants: 1) breach of contract, 2) negligence, 3) fraud, and
4) negligent misrepresentation. Plaintiffs also re-allege
emotional distress damages in their negligent misrepresentation
claim and add them to their negligence claim. Further, in all
four claims, Plaintiffs re-allege as damages their attorneys'
fees incurred in their separate state-court suit against their
tenants. Those fees now allegedly exceed \$250,000. Defendants
presently move to strike all references to 1) emotional distress
damages in the negligence and negligent misrepresentation claims
and 2) attorneys' fees in all claims.

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¹All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure, unless otherwise noted.

²Because oral argument would not be of material assistance,
this matter was deemed suitable for decision without oral
argument. E.D. Local Rule 78-230(h).

STANDARD

Pursuant to Rule 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous material." Fed. R. Civ. P. 12(f). Once the court strikes material from the complaint, it may then consider whether to grant the plaintiff leave to amend. Under Rule 15(a), when there is no "[u]ndue delay, bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment," leave to amend a complaint is to be "freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182 (1962); Fed. R. Civ. P. 15(a). Generally, leave to amend is denied only if it is clear that the deficiencies of the complaint could not be cured by amendment. Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980).

ANALYSIS**1. Emotional Distress Damages**

In the present action, Defendants argue that Plaintiffs do not allege any new facts in their amended complaint and fail to establish emotional distress damages. Plaintiffs rebut that this Court misinterpreted California case law, which, according to the Plaintiffs, does not foreclose recovery for emotional distress in negligence and negligent misrepresentation actions where there is no physical injury or impact. (Pls' Opp'n at 4:14-16, 24-26.)

1 Thus, Plaintiffs essentially contend they did not need to allege
2 anything new in their amended complaint.

3 Further, Plaintiffs argue that the Court mistakenly ruled
4 that the Plaintiffs' complaint alleged only potential property
5 damage. (Pls' Opp'n at 5:2-7.) Plaintiffs contend that because
6 they were insured by Defendants, and an insurance policy is a
7 contract that engenders peace of mind, Plaintiffs' suffered
8 emotional distress when Defendants' negligently revoked the
9 policy. Thus, according to Plaintiffs, they lost peace of mind,
10 which exceeds mere property damage. The Court disagrees.

11 The Court stated clearly in its original Order and
12 reiterates here that, under California law, Plaintiffs'
13 unintentional tort claims (negligence and negligent
14 misrepresentation) will not support recovery for emotional
15 distress arising from property damage, absent special
16 circumstances. (Ct. Memo. & Order at 8:17-9:9); Erlich v.
17 Menezes, 21 Cal. 4th 543, 555-56 (1999); Friedman v. Merck & Co.,
18 107 Cal. App. 4th, 454, 484-85 (2003); Yu v. Signet
19 Bank/Virginia, 69 Cal. App. 4th 1337, 1397 (1999); Finch v.
20 Brenda Raceway Corp., 22 Cal. App. 4th 547, 554 (1994). The
21 Court finds that Plaintiffs still allege only potential injury to
22 personal property in their amended complaint. Plaintiffs added
23 little, if anything, to their complaint to cure the original
24 deficiencies. Thus, because it is clear that Plaintiffs'
25 emotional distress allegations are based on mere property damage,
26 they are immaterial and impertinent to the complaint.

27 Furthermore, the Court finds Plaintiffs' peace of mind
28 argument baseless. Insurance policies, while they may instill

1 peace of mind, are intended primarily to protect the insured from
2 paying out-of-pocket expenses in case of accident. They do not
3 create a "protective barrier" around the insured, protecting
4 against any and all physical harm. As such, Plaintiffs' alleged
5 loss of the insurance policy constitutes economic harm only.
6 Because economic injury alone does not support emotional distress
7 damages, all references to emotional distress must be stricken
8 from Plaintiffs' negligence and negligent misrepresentation
9 claims.

11 **2. Attorneys' Fees**

13 The Court stated in its previous Order that, under the
14 American Rule, Plaintiffs are expected to shoulder their own
15 legal fees. (Ct. Memo. & Order at 10: 14-15.) Plaintiffs had
16 not met the threshold for attorneys' fees under the Brandt
17 exception to the American Rule. See Brandt v. Superior Court, 37
18 Cal. 3d 813, 817, 820, 820 n.8 (1985). Nor had Plaintiffs
19 pleaded special circumstances, under the Prentice exception,
20 showing they were forced to take legal action in order to
21 vindicate a particular right. See Prentice v. N. Am. Title Guar.
22 Corp., 59 Cal. 2d 618, 620 (1963). Thus, the American Rule
23 governed the action, and the Court struck all references to
24 attorneys' fees.

25 Defendants argue here that Plaintiffs' again fail to allege
26 any new facts to justify attorneys' fees as damages. In their
27 amended complaint, Plaintiffs did strike all Brandt allegations.
28 However, in an attempt to plead the Prentice exception,

1 Plaintiffs now allege that the Defendants' conduct forced them
2 "to protect their rights and interests by retaining legal counsel
3 and bringing legal action" against their tenants in state court.
4 (Pls' Amended Compl. at ¶¶ 67, 74, 88, 101.) Thus, Plaintiffs
5 seek to recoup attorneys' fees from Defendants for an expensive
6 yet separate state-court action.

7 The Court finds that Plaintiffs have again failed to plead
8 exceptional circumstances analogous to those in Prentice. The
9 Prentice court ordered the defendant to pay the plaintiffs'
10 attorney fees because the plaintiffs were forced to bring a
11 quiet-title action against a third party due to the defendant's
12 proven negligence. A "natural and proximate" connection existed
13 between the plaintiffs' suit against the defendant and the
14 underlying third-party action. See Prentice, 59 Cal. 2d at 621.

15 In the present action, there is no such natural and
16 proximate connection between Plaintiffs' suits in this Court and
17 state-court. Merely alleging, as Plaintiffs have done, that they
18 were forced to sue their tenants because of Defendants' conduct
19 does not establish the requisite natural and proximate connection
20 between the suits. See Davis v. Air Tech Indus., Inc., 22 Cal.
21 3d 1, 7 (1978). Plaintiffs have therefore failed to allege the
22 exceptional circumstances under Prentice to overcome the American
23 Rule. Consequently, all references to attorneys' fees are
24 immaterial and impertinent and must be struck from the amended
25 complaint.

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1 **3. No Leave to Amend**

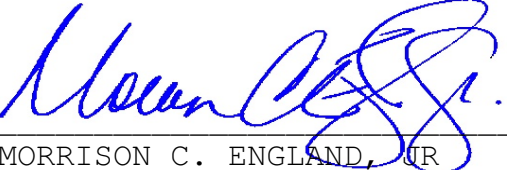
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3 In light of the fact that Plaintiffs had ample opportunity
4 to cure the deficiencies in their complaint and failed to do so,
5 it is clear to the Court that amendment is futile. Thus, the
6 Court denies Plaintiffs leave to amend. Furthermore, the Court
7 notes that the amended complaint is almost word-for-word the same
8 as the original, except for some minor, inconsequential changes.
9 The Court is concerned that there is a pattern in how Plaintiffs'
10 counsel continues to file papers that border on being frivolous
11 and filed for apparently no other reason than to increase
12 attorneys' fees. Counsel is cautioned that if further papers or
13 motions of this sort are filed, the Court will consider imposing
14 the appropriate sanctions available under the circumstances.

15
16 **CONCLUSION**

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18 Based on the foregoing, Defendants' Motion to Strike is
19 GRANTED without leave to amend.

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21 IT IS SO ORDERED.

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23 DATED: August 15, 2005

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26 MORRISON C. ENGLAND, JR.
27 UNITED STATES DISTRICT JUDGE
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